PROGRESS OF THE LAW.

As Marked by Decisions Selected from the Advance Reports.

APPROPRIATION OF LAND.

What Constitutes Compensation

In *United States* v. *Lynah,* 23 S. C. R. 349, the Supreme Court of the United States holds that the turning of a valuable rice plantation into an irreclaimable and valueless bog, as the necessary result of an improvement in navigation undertaken by the United States Government, is a taking of the land, within the meaning of the Fifth Amendment to the Federal Constitution, and therefore the liability of the United States to make just compensation exists and is not defeated because such land was taken by the Government in the exercise of its power to improve navigation. Compare *Scranton* v. *Wheeler,* 179 U. S. 141, where it was held that the destruction of access to land abutting on a navigable river by the construction by Congress of a pier on the submerged lands in front of the upland was not a *taking* of private property for public uses, but only an instance of consequential injury to the property of the riparian owner.

CORPORATIONS.

Insolvency: Individual Stockholders

In *Cumberland Lumber Co.* v. *Clinton Hill Lumber Co.,* 54 Atl. 452, the Court of Chancery of New Jersey holds that while the stockholders of a corporation cannot interpose any defences to an insolvency suit against it that the corporation itself cannot set up, they can have the validity of matters alleged as a defence to their liability as stockholders adjudicated in suits brought by the receiver to collect assessments levied against them. Consequently, the insolvency proceeding is not conclusive upon their liability when the suit is brought by the receiver.

Receivers: Trust Funds

In *Avery* v. *Preston National Bank,* 93 N. W. 1062, the Supreme Court of Michigan holds that where a trustee in a mortgage for the benefit of certain creditors including a bank realized under the mortgage, and deposited the proceeds in the bank in his own name, and subsequently he was appointed receiver for

CORPORATIONS (Continued).

the mortgagor, as between the receiver and the bank, the receiver was entitled to the funds, and the bank could not withhold them on the ground that they were a trust fund, and really belonged to the bank. Further, in a suit by the executor of the receiver against the bank, questions as to the disposition of the fund involved in the accounting of the receiver's successor could not be determined.

CRIMINAL LAW.

Accessory after the Fact

In *Whorley* v. *State,* 33 Southern, 849, the Supreme Court of Florida (Division A) holds that in order to convict a person of being accessory after the fact to a felony, it is, of course, indispensably necessary to prove that the party charged, at the time he rendered the forbidden aid or assistance to the felon, knew that he had committed a felony, or was an accessory before the fact to a felony; and it must be further shown that the aid or assistance given was done with the intention and for the purpose of helping the felon to avoid or escape detection, arrest, trial or punishment.

CRIMINAL PROSECUTION.

Failure of Defendant to Testify

The fact that it is provided in almost all the states, if not in all, that a person accused of a crime may testify, but that his failure to do so shall not be commented upon renders the case of *People* v. *Hammond,* 93 N. W. 1084, of general interest. In that case the prosecuting attorney in closing said, in response to a statement by defendant's counsel: "Defendant's counsel when he said that the people's witnesses and God were the only ones who knew the contents of the telegrams, forgot his client, whom it is alleged the telegrams were sent to, and whom it is claimed sent one of them." The Supreme Court of Michigan holds that this statement was not error, especially in view of the fact that the jury were instructed that the failure of the defendant to testify in his own behalf should not weigh against him. The inference, however, from the words used seems not far to find.

GIFTS.

A husband instructed a bank, in which he had a savings account, to put the name of his wife on his book opposite his name, so that she could draw from the account, stating that it was as much hers as his. When making his will he stated that the money in the bank was already settled, and that it belonged to the wife, and he told another that his wife had control over the money the same as he did. The Supreme Court of Michigan holds in *Burns* v. *Burns,* 93 N. W. 1077, that these facts do *not* show a gift of the money to the wife. See *Brown* v. *Brown,* 23 Barb. 565.

Savings Deposit

INSURANCE.

In *Schmidt* v. *Philadelphia Underwriters,* 33 Southern, 907, the Supreme Court of Louisiana holds that the deliberate and fraudulent attempt of the plaintiff to impose upon the defendant insurance company liability for a loss which he has not sustained defeats his right to recover according to the terms of the contract upon which he sues. See *Claflin* v. *Ins. Co.,* 110 U. S. 81.

Fraud of Plaintiff

INSURANCE COMPANIES.

In *New York Life Ins. Co.* v. *N. L. Curry & Bro.,* 72 S. W. 736, the Court of Appeals of Kentucky holds that a provision in a contract of loan from an insurance company for which its paid-up policy is pledged as collateral, that on default in payment of interest for thirty days the policy shall, at the company's option, be surrendered to it at the customary cash surrender value then allowed by the company for the surrender of policies of that class is void. It is permitted, it is held, to the insurer to forfeit the policy for failure to pay a premium, but not to forfeit merely as a penalty for the non-payment of borrowed money. Compare *Montgomery* v. *Phoenix Mutual Life Ins. Co.,* 72 S. W. 736.

Loans: Policies as Collateral

INTERSTATE COMMERCE.

The daily press has already made the readers of the REGISTER acquainted with the decision of the United States Supreme Court in *Champion* v. *Ames,* 23 S. C. R. 321, where it is held that the carriage of lottery tickets from one state to another by an express com-

Regulation by Congress

INTERSTATE COMMERCE (Continued).

pany engaged in carrying freight and packages from state to state is interstate commerce, which Congress, under its power to regulate, may prohibit by making it an offence against the United States to cause such tickets so to be carried. The significance of the case seems to consist in its being an entire prohibition of interstate commerce in a certain article "for the purpose of guarding the people of the United States against the 'widespread pestilence of lotteries' "—apparently a police regulation, and also in its possible bearing upon anti-trust legislation, so far as concerns the suggestion that Congress may penalize interstate commerce in "trust" articles. As in many of the recent important cases the decision is by a bare majority, four judges dissenting.

JOINT-STOCK ASSOCIATION.

In re Pittsburg Wagon Works' Estate, 54 Atl. 316, it appeared that an unincorporated joint-stock association was organized to buy real estate, the title to which was held in trust for the association. The interest of each member was to be determined by the number of shares which he held, which he could sell only by transferring on the books of the company. The Supreme Court of Pennsylvania holds that, just as in the case of an incorporated company, the interest of a member was personal property and could not be sold under an execution as real estate.

Personal Property: Execution

LANDLORD AND TENANT.

Where a landlord takes charge of the premises after abandonment by the tenant merely to protect them from injury, or knowing that the tenant does not intend to return, rents them on the latter's account, such acts may not show an assent to the abandonment; but where he takes possession and rents the premises on his own account, it is conclusive evidence of surrender and acceptance: Supreme Court of Arkansas in *Hayes* v. *Goldman,* 72 S. W. 563. It is for the jury to decide which is the proper construction to be put upon the facts.

Assent to Abandonment of Term

MISTAKE OF LAW.

The Court of Appeals of Kentucky holds in *Swisscher* v. *Commonwealth*, 72 S. W. 306, that under the Kentucky statute providing that whoever carries concealed a deadly weapon shall be punished, it is no defence that one thought he had a right under a certain statute to carry a pistol, and would have had had the statute been constitutional.

Excuse

NATIONAL BANKS.

The Supreme Court of the United States holds in *Easton* v. *State of Iowa*, 23 S. C. R. 288, that a state statute which attempts to prohibit national banks from receiving deposits when insolvent, and prescribes a punishment for a violation of such prohibition by any officer or agent thereof, is invalid as an attempt to control and regulate the business operations of national banks. The state statute was general in terms, but is held incapable of application to national banks. Compare the recent case of *Davis* v. *Elmira Sav. Bank*, 161 U. S. 275.

State Regulation

NEGLIGENCE.

The Supreme Court of Pennsylvania holds in *Powelson* v. *United Traction Co.*, 54 Atl. 282, that to step on or off a moving car, whether the power which propels the car be steam or electricity is *per se* negligence, but that to this rule there are exceptions, particularly in the case of electric cars. That these exceptions make the statement of the general rule somewhat questionable appears from the application of the principle in this case, where the evidence showed that the plaintiff attempted to board an open car, and waved his hand when he saw it coming about one hundred feet distant; that when it reached the plaintiff it had almost stopped, and he stepped on the running board, and was about to go into the car, when the conductor rang the bell, and the car started, and threw him off. The court holds that the question is for the jury. See *Walters* v. *Phila. Traction Co.*, 161 Pa. 36.

Boarding a Moving Electric Car

The Supreme Judicial Court of Massachusetts holds in *Timms* v. *Old Colony St. Ry.*, 66 N. E. 797, that in an action against a street railway company for injuries to a passenger, evidence showing that the plaintiff, who was standing near the edge of the rear plat-

Street Railway

NEGLIGENCE (Continued).

form without holding on to anything, was pitched off by a sudden jerk in the car, caused by a sudden stop, without showing that there was any defect in the car or rails, or that the apparently sudden stop was not justifiable, fails to show any negligence on the part of the defendant. See and compare *Byron* v. *Lynn & Boston R. R.*, 177 Mass. 303.

PARENT AND CHILD.

In *Callaghan* v. *Lake Hopatcong Ice Co.*, 54 Atl. 223, the Supreme Court of New Jersey holds that where a son, who stands in the relation of a servant to his father is disabled by the tortious act of another, the father may maintain an action *per quod servitum amisit* against the tort feasor, and therein recover the damages sustained by him during the son's lifetime, notwithstanding that in consequence of the same tortious act the son dies at a later time.

Injury to Son: Action by Father

PERCOLATING WATERS.

The Supreme Court of Minnesota holds in *Stillwater Water Co.* v. *Farmer*, 93 N. W. 907, that except for the benefit and improvement of his own premises, or for his own beneficial use, the owner of land has no right to drain, collect or divert percolating waters thereon, when such acts will destroy or materially injure the spring of another person, the waters of which spring are used by the general public for domestic purposes. An action may be maintained by an injured party to restrain and prohibit such waste. The case presents an excellent review of cases related to the question passed upon. See and compare *Pixley* v. *Clark*, 35 N. Y. 520.

Diversion: Injunction

PHOTOGRAPHS.

The Supreme Court of New Jersey in *McLean* v. *Erie R. Co.*, 54 Atl. 238, holds the following instruction by the trial judge as to photographs to be not erroneous: "I have admitted these photographs in evidence. They are put before you. You ought to look at them with a good deal of caution. I suppose all of you know that a photograph of natural scenery is more or less misleading as to distance, on account of what the artist

Instructions by Judge

PHOTOGRAPHS (Continued).

would call perspective or want of perspective. Do not be misled by the photographs in an estimate of distance. In that respect, it is fair to say that they are unavoidably misleading. It is the nature of photography."

SURFACE WATER.

In *Stocker* v. *Nemaha County,* 93 N. W. 721, the Supreme Court of Nebraska holds that a county is not liable to land-

Liability of County

owners for injuries caused by the discharge of surface water from ditches constructed by the county authorities, diverting such water from its natural course. See *Green* v. *Harrison County,* 61 Iowa, 311.

TRUST FUNDS.

A trust fund does not lose its character as such by being deposited by the trustee in a bank to his own credit, but, to

Liability of Bank

hold the bank therefor, it must be pleaded and proved that the fund remains in the bank in some form: Supreme Court of Nebraska in *Chamberlain* v. *Chamberlain Banking House,* 93 N. W. 1021.

VALUE OF LAND.

In *Friday* v. *Pennsylvania Railroad Co.,* 54 Atl. 339, the Supreme Court of Pennsylvania lays down several rules

Evidence

with reference to the proper method of presenting expert testimony as to the value of land. The witness, it is held, should fix the price from a knowledge of the price at which lots are generally held for sale and at which they are sometimes sold in the course of ordinary business in the neighborhood. Where a witness testifies as to the value of property to be condemned, he should be required to designate the properties in the vicinity with which he is acquainted, and set forth the source of his knowledge of their values. Further where an expert as to values of real estate has testified as to his qualifications, the opposing party should be allowed to cross-examine him before he is permitted to testify. Finally where a witness as to value has given his opinion, and has also stated that he would give the price named for the property, an instruction leaving the impression upon the jury that the estimate of the witness was entitled to great weight because of his apparent willingness to purchase is error.